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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS AMICUS CURIAE

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's constitutional right to equal protection of the laws was violated in the specific circumstances of this case, because Respondent exercised his peremptory strikes to create a jury without blacks.

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INTEREST OF THE AMICUS CURIAE

The National Association for the Advancement of Colored People ("NAACP"), a New York not-for-profit corporation, is an organization devoted to obtaining equal rights for blacks and minority citizens by lawful and peaceful means. The NAACP is a membership corporation with approximately 1700 local affiliates in all fifty states and in the District of Columbia. The basic aims and purposes of the organization are to secure full and equal citizenship rights for blacks and other minorities without restrictions, burdens, limitations or barriers based upon

race or color. The blacks in the United States are engaged in what often seems to be a never-ending struggle against laws, customs, practices, usages and opinions relegating them to inferior status. Evidence of that struggle is apparent in the issue raised in this *amicus curiae*.

STATEMENT OF THE CASE

For the purpose of brevity, the Statement of the Case which appears in the brief of the petitioner is adopted by the National Association for the Advancement of Colored People as *amicus curiae*.

ARGUMENT

MOORE'S STRIKING OF ALL BLACK JURORS VIOLATED FLEMING'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS.

The Fourteenth Amendment by its terms is directed to the states. It provides in pertinent part:

> [n]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[1]

The necessary action to trigger this court's review is present in this case. Respondent's counsel in exercising his peremptory challenges acted in conformity with an apparently neutral state statute that had a discriminatory impact on potential black jurors.[2] Though no exact test has been enunciated for determining the degree to which judicial enforcement of discriminatory laws constitutes state action, this court has tended to find state action in private conduct relying on such laws. *See Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating a constitutional amendment which would have prohibited the legislature

[1] U.S. Const. Amend. XIV.

[2] *See* Virginia Code 58.01-359(B).

from passing fair housing laws on the ground that the referendum effectively encouraged and approved racial discrimination). Fleming has met the burden of the state action threshold in this case because the trial judge overruled Fleming's objection to the peremptory striking. The state action becomes more apparent when viewed in the context of a libel trial where race was at the core of the controversy. In this regard, the Virginia statute prescribing the use of peremptory challenges was discriminatory in its application since it was susceptible to perverse manipulation in a way that brought about an all white jury to render a tainted verdict that found a black man guilty of stating that a white man does not want black people "within his sight."

Recently, in *Batson v. Kentucky*, No. 84-6263, Slip Op. at 1 (U.S. April 30, 1986), this court held that a state denies a defendant equal protection of its laws when it puts him on trial before a jury from which members of his race have been purposely excluded. More importantly, this court expressly overruled a portion of its holding in *Swain v. Alabama*, 380 U.S. 202 (1965), which required that an accused who alleges violation of equal protection in jury selection proffer evidence of the state's systematic use of the peremptory challenge to exclude members of his race from the jury venire. Noting that the preceding "evidentiary formulation is inconsistent with equal protection standards," this court held that

> [a] defendant may make a prima facie showing of purposeful discrimination in selection of the venire [or petit jury] by relying solely on the facts concerning its selection in his case.

Slip Op. at 15.

Under the standards articulated in *Batson*, a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on

evidence concerning the prosecutor's use of peremptory challenges at the defendant's trial. In so doing, the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of the defendant's race; that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate"; that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude persons from the petit jury on account of their race. Slip Op. at 16.

This *amicus curiae* asks this court to extend the principles outlined in *Batson* to the use of peremptory challenges in a libel case in which the subject of the controversy dealt wholly with race. Moore was a white professor who alleged that he was libeled when Fleming, a black developer, placed an advertisement in a local newspaper stating that Moore's opposition to the building of a housing complex stemmed from his desire of not wanting to see black people "within his sight." Thus, the nature of this controversy demanded that the trial judge exercise restraint on any peremtory challenges that struck all blacks or all whites from the jury as the case may be.

Admittedly, jury selection procedures in state civil trials are within the exclusive domain of the states. However, discriminatory jury selection procedures that impinge upon the constitutional rights of black citizens should trigger strict scrutiny by this Court. Thus, the *Batson* case is noteworthy for having firmly rested on the Equal Protection clause, and not the Sixth Amendment right to a jury trial which is limited to jury selection for criminal defendants. Further, this *amicus curiae* asks that this Court extend the principles outlined in *Batson* to any civil trial in which black interests are at stake.

Assuming *arguendo,* that this Court agrees to apply *Batson's* standards to the instant case, it is unquestionable that Fleming, a black man, is a member of a cognizable racial group whose right to a fair trial was subverted by the peremptory striking of the two blacks who otherwise would have sat on the petit jury. As the record reflects, defense counsel's timely objection to this flagrant abuse was overruled by the trial judge. This action resulted in Fleming being tried by an all white jury. That jury returned a verdict in excess of $400,000.00 against Fleming because he stated that a white man did not want black people "within his sight."

Fleming is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits

> . . . those to discriminate who are of a mind to discriminate . . . In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative.

Slip Op. at 16. In this case the discriminatory inference may be adduced from the mere fact that Moore's counsel struck all the blacks from the jury. The judge did not require that he explain the reason for his challenges.[3] Nothing in the record indicates any disqualifying factors that would have warranted the striking of the black jurors. In fact, the color of their skin was the sole reason why they were targeted for exclusion from the petit jury.

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[3] Admittedly, the judge may have relied on the flawed holding in *Swain, supra,* which has significantly influenced the use of peremptory challenges in civil trials.

Fleming's counsel was permitted a certain number of strikes.[4] However, Fleming's counsel's exercise of his peremptory challenges (which was not based on racial grounds) does not justify Moore's counsel's striking of the black jurors on racial grounds. In the context of this case, Fleming's counsel could not use his peremptory challenges to produce an all black jury or even a jury that was 50% black. However, Moore's counsel was able to use his peremptory challenges to fashion a jury 100% white.

The inequity of the situation cannot merely be explained by the fortuitous circumstances of chance and demography. Though these factors influence the racial composition of juries across the country, they are by no means controlling. It is the peremptory challenge that is used as the ultimate device for excluding blacks from juries. As Fleming's case demonstrates, two blacks were poised to sit on the jury on the day of trial but the peremptory challenges were applied to exclude them. If the abuse of this device remains unchecked, trial by jury will be forever tainted and the courts will cease to be the last bastion of justice for blacks in this country.

Virginia's record with respect to discriminatory jury selection procedures is legendary.

> The slowness with which reforms have been made emphasizes that corrective action must be undertaken with a deliberateness equal to that with which Virginia achieved the total exclusion of Negroes from juries in the early years of this century. Until such action is taken, juries possess the capacity to be instruments of oppression.[5]

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[4] This court has expressly reserved the question as to whether the Constitution imposes limits on the exercise of peremptory challenges by defense counsel. Slip Op. at 8, n. 12.

[5] S. W. Tucker, *Racial Discrimination in Jury Selection In Virginia*, 52 Virginia Law Review 736 (1966).

In this case, the deliberate striking of blacks from the petit jury left in place an all white jury that acted as an instrument of oppression when it returned an excessive verdict against a black man. These white jurors were drawn from representatives of the same community that Moore spearheaded when he waged a crusade against Fleming's application for a zoning variance that would have allowed him to build low income housing. There were indications that Moore received substantial support from his white peers in his lobbying of the Albemarle County Board of Supervisors, which effectively denied the application for a zoning variance. Thus, it is not unlikely that these were the same whites who were selected to sit on the jury in the libel trial. Were the blacks present allowed to sit on the jury, they may have been able to offer their white counterparts an enlightened perspective of just what Fleming meant by his advertisement.

> . . . trial juries have a tremendous potential for creating democracy in action. Fulfillment of this potential, however, is precluded by racial prejudices which invade the selection process . . . no other institution conducted under government compulsion has the capacity for bringing together for a common purpose adults who may be likely to represent so many varying experiences, backgrounds, and conditions or stations in life.[6]

In *Ballard v. United States,* 329 U.S. 187 (1946), this court noted that the pernicious effects occasioned by the exclusion of blacks from juries

> are not limited to the defendant — there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts.

Exclusion of blacks from juries on racial grounds will foster the perception fairly common in the black

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[6] *Id.* at 750.

community that the machinery of justice is operated and manipulated by whites to achieve their own aims. Such perception encourages disrespect and distrust of the judicial system. Sadly, racial use of peremptory challenges also perpetuates stereotypical notions of blacks since it questions their abilities to conduct objective fact-finding in trials involving black issues.

> The effect of black exclusion on civil litigation is . . . invidious. The juries are the same; only the stakes are different . . . It is not surprising that neither the jury nor the law has legitimacy for black litigants or the black community, when they so obviously do not work for black people.[7]

Fleming had a right under the equal protection clause to be represented by a jury that was selected from a representative cross-section of the community. This court has held that under the Sixth Amendment a defendant in a criminal trial is entitled to a cross-sectional jury representation. *See Taylor v. Louisiana,* 419 U.S. 522 (1975). In recent times, the court has not had occasion to address whether the Equal Protection Clause requires cross-sectional jury representation in civil trials. However, over 100 years ago, this Court in *Strauder v. West Virginia,* 100 U.S. 303 (1880) in determining that exclusion of blacks from juries violated the 14th Amendment, stated:

> [t]he very idea of a jury is a body of men composed of the peers of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds . . . It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore,

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[7] Note, *The Case For Black Juries,* 79 Yale L. J. 534-35 (1970).

> operate in some cases to deny to persons of those classes the full enjoyment of the protection which others enjoy.

Strauder, at 308. Quoting in part the exact language above, this Court in *Batson* reaffirmed the principles expressed in *Strauder, supra*, namely that the Fourteenth Amendment entitles a person to be tried by a jury of his peers or equals. Slip Op. at 5. It is submitted that the cross-sectional formulation expressed in *Strauder* and reaffirmed in *Batson*, constitutes a Fourteenth Amendment cross-sectional requirement with respect to civil jury trials.

This is not to say that heretofore all juries in America should consist of a certain quota of blacks. This Court noted in *Batson:*

> [w]e have never held that the sixth amendment requires that 'petit juries actually chosen mirrors the community and reflect the various distinctive groups in the population . . . Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society.

Slip Op. at 5 n.6. It would appear that the proscription against proportional jury representation in Sixth Amendment cases also applies to jury selection in Equal Protection cases. Though the court's view on the heterogeneity of this society is well taken, it should be pointed out that the use of the peremptory challenge to exclude blacks from juries artificially distorts the concept of heterogeneity. Placing strict limits on the use of the peremptory challenges in cases where race is at the core of the controversy or where black interests are at stake, may serve to promote juries that more aptly reflect the heterogeneity of our society.

It is hoped that in the future this Court will be able to note "with confidence"[8] that race no longer plays a role in the jury selection process. However, at this time, America remains a racially polarized society. The use of peremptory challenges to exclude blacks from juries exacerbates racial polarization. It is for these reasons that Justice Marshall called for the abolishment of peremptory challenges in criminal trials. Slip Op. at 1 (Marshall, J., concurring). Whether Justice Marshall would require its similar elimination in civil trials where race is the subject of the controversy or where the interests of blacks are at stake, is unclear. Preservation of this weapon merely on the basis of its lengthy tradition and customary use is unfair when weighted against the Equal Protection rights of black litigants. This Court should hold that the use of peremptory challenges to strike black jurors in civil trials where race is at the core of the litigation or where the interests of black litigants are at stake, is inherently suspect.

Respectfully submitted,

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[8] *See* Slip Op. at 7, "we can be confident that no state now has such a law [providing that only white men can serve as jurors]."